

2980 Nos. 15225 - 15226

United States
Court of Appeals
for the Ninth Circuit

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy; CAPT.
J. J. GREYTAK, U. S. Navy, et al.,

Appellant,

vs.

UNITED STATES, ex rel., LOUIS V. BOSCOLA,

Appellee.

CHARLES S. THOMAS, Assistant Secretary of Defense for
the Navy, et al.,

Appellant,

vs.

UNITED STATES OF AMERICA on the Relation of Peter
J. Smith,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington.

Northern Division.

FILED

JAN - 7 1957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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1107 American Building,
Seattle 4, Washington,

Attorneys for Appellee, Peter J. Smith.

In the District Court of the United States, for the
Western District of Washington, Northern
Division

No. 4101

UNITED STATES, Ex Rel., LOUIS V. BOS-
COLA,

Petitioner,

vs.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy;
CAPT. J. J. GREYTAK, U. S. Navy; and
CHARLES S. THOMAS, Assistant Secretary
of Defense for the Navy,

Respondents.

PETITION FOR WRIT OF
HABEAS CORPUS

Comes Now the petitioner, and respectfully shows
to the above-entitled court as follows:

I.

Jurisdiction of the above-entitled court arises pur-
suant to 28 U.S.C. 2241 (C-1).

II.

Petitioner is now held in custody in restraint of
his liberty, under the color and authority of the
laws of the United States, and that he has been
committed for trial before a general court-martial
of the U. S. Navy, under color of the provisions of
50 U.S.C.A. § 552 (4), pursuant to the orders of the
respondents herein.

III.

That petitioner is a citizen of the United States and is a lawful resident of the city of Bremerton and State of Washington. That on May 29, 1946, petitioner completed 30 years of service in the United States Navy for pay purposes; that on May 31, 1947, petitioner was released from active duty with the United States Navy, and subsequently on April 1, 1947, petitioner was released from all active duty, given 30 days terminal leave, and retired from the U. S. Navy, having at that time completed 30 years, 7 months, and 23 days of honorable navy service as a chief musician (MUC).

IV.

That petitioner thereupon returned to civilian life, and subsequently on January 8, 1954, petitioner was charged with the crime of carnal knowledge in the Superior Court of the State of Washington, in and for Kitsap County, under Docket No. 33091; that petitioner entered a plea of guilty to said charge, and was sentenced to a maximum of 15 years in the Washington State penitentiary at Walla Walla, Washington. That subsequently, on January 31, 1956, under recommendations of the Washington State Board of Prison Terms and Paroles, petitioner was released from the Washington State Penitentiary at Walla Walla, Washington, on parole. That, upon petitioner's release from the Washington State Penitentiary on January 27, 1956, respondents, acting by and through their authorized agents took petitioner into custody at Walla Walla,

Washington, and informed him that he was being involuntarily returned to active duty, under color and authority of Article II (4), U.S.M.J., 50 U.S.C.A. § 552 (4) and under Article C-10330 (1) Bupers Manual; that a copy of the purported active duty orders were served upon petitioner, and pursuant to such mandate, petitioner was involuntarily transported to the U. S. Naval Station, Seattle, Washington, and has since said time been on active duty in the U. S. Navy, at said naval station against his will.

V.

That respondents' recall of petitioner to active duty was in violation of the provisions of 34 U.S.C.A. § 433, which section authorizes the Secretary of Navy to recall retired enlisted men into active duty "in time of war, or when a national emergency exists"; that at the time of petitioner's recall into active duty by respondents, the United States was not in a state of war, nor was there a national emergency in existence.

VI.

That respondents, acting by and through their authorized agents have conducted a hearing as to certain alleged criminal violations of the Uniform Code of Military Justice, which allegedly occurred on January 8, 1954, and as a result of this hearing, the respondents, on the 2d day of March, 1956, ordered the petitioner to be brought to trial before a general court-martial, appointed and convened by

Rear Admiral A. M. Bledsoe, Commandant, 13th Naval District.

VII.

That respondents threaten to forthwith proceed to bring petitioner to trial before a general court-martial, having charged petitioner with an alleged offense in violation of the Uniform Code of Military Justice, under Article 120, 50 U.S.C.A. §714. That said charge is for the same act for which petitioner was previously tried and found guilty by the superior court of the State of Washington, in and for Kitsap County, under Docket No. 33091, and is the same offense for which petitioner has previously served two years of a maximum 15-year sentence, at the Washington State Penitentiary at Walla Walla, Washington, and that the trial of petitioner under the said general court-martial will result in petitioner's being twice put to trial for the same offense.

VIII.

That respondents are proceeding illegally and without jurisdiction in holding petitioner to stand trial by general court-martial for the following reasons:

1. 34 U.S.C.A. § 433 does not authorize respondents or any other person to return a retired enlisted man to active duty other than "in time of war, or when a national emergency exists."

2. That the alleged crime of which petitioner is accused occurred at a time when petitioner had been

retired from the U. S. Navy for a period of six years.

3. That the actions of respondents are in violation of amendments V and VI, U.S. Constitution.

4. That the provisions of Article II, (4) U.C.M.J., 50 U.S.C.A. § 552 (4), have no application to retired enlisted personnel, and that it was not the intention of the legislature that retired enlisted personnel be subjected to courts-martial jurisdiction after retirement.

5. That the trial of petitioner by general court-martial by respondents bears no relation to the enforcement of discipline or to the regulation of the armed forces of the United States.

6. That Article II (4), U.C.M.J., 50 U.S.C.A. § 552 (4), insofar as it purports to subject retired enlisted personnel to trial by general courts-martial after retirement is unconstitutional and in violation of Amendments V and VI, U.S. Constitution.

7. That petitioner is still under the continuing jurisdiction of the Superior Court of the State of Washington, in and for Kitsap County, until such time as petitioner completes the provisions of his parole.

Wherefore, Petitioner prays that the above-entitled court issue an order requiring respondents to appear and show cause on a date to be set by the court, why a Writ of Habeas Corpus should not

be granted, directed to Rear Admiral A. M. Bledsoe, U.S. Navy, and Capt. J. J. Greytak, U.S. Navy, or any other persons who threaten to detain and bring petitioner to trial by general court-martial pursuant to respondents' order, requiring said respondents to release petitioner from all restraint, authority and control.

Petitioner further prays that pending the determination of the issues herein, that said respondents be directed to release petitioner.

Petitioner further prays the court to grant such further and other relief to petitioner that may be found just and proper in the premises.

DAY & WESTLAND,
Attorneys for Petitioner.

State of Washington,
County of King—ss.

Louis V. Boscola, being first duly sworn, upon oath deposes and says:

That I am the petitioner in the foregoing petition for a Writ of Habeas Corpus; that I have read the above and foregoing petition for Writ of Habeas Corpus, know the contents thereof, and believe the same to be true.

/s/ LOUIS V. BOSCOLA.

Subscribed and sworn to before me this 7th day of March, 1956.

[Seal] /s/ RICHARD REINERTSEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed March 7, 1956.

[Title of District Court and Cause.]

No. 4101

ORDER TO SHOW CAUSE

This matter having come on before the undersigned judge for the above-entitled court, in open court, upon the petition of Louis V. Boscola for a Writ of Habeas Corpus, and the court having read said petition, considered the same, and being fully advised in the premises, now therefore,

It Is Hereby Ordered that Rear Admiral A. M. Bledsoe, U.S. Navy, and Capt. J. J. Greytak, U.S. Navy, and Charles S. Thomas, Assistant Secretary of Defense for the Navy, or any other person or persons who may be temporarily acting on their behalf, be and they hereby are ordered to appear before the undersigned judge of the above-entitled court, at his courtroom, in the United States Court House, in the City of Seattle, County of King, State of Washington, at the hour of 2:00 p.m. on Monday, the 2nd day of April, 1956, and to then and there

show cause, if any there be, why the prayer of Louis V. Boscola should not be granted.

Done in Open Court this 7th day of March, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

DAY & WESTLAND,
Attorneys for Petitioner.

[Endorsed]: Filed March 7, 1956.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4105

UNITED STATES OF AMERICA, on the Rela-
tion of PETER J. SMITH,

Relator,

vs.

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy; A. M. BLEDSOE, Rear
Admiral, U.S. Navy; and J. J. GREYTAK,
Captain, U.S. Navy,

Respondents.

PETITION FOR WRIT OF
HABEAS CORPUS

To the Honorable William J. Lindberg, Judge of
the Above-Entitled Court:

Comes Now Peter J. Smith and respectfully peti-
tions and shows the Court as follows:

I.

Jurisdiction of this cause is vested in this Court pursuant Title 28 U.S. Code, Section 2241 (C-1).

II.

Your petitioner is a citizen of the United States and resides within the Western District of Washington, Northern Division; that petitioner is unlawfully imprisoned and detained under color and authority of the laws of the United States; that he has been committed for trial before a general court-martial of the United States Navy under color of the provisions of 50 U.S.C.A. Section 552 (4) pursuant to pretended orders of the respondent, J. J. Greytak, Captain, U.S. Navy, Commandant U.S. Naval Station, 13th District, who in turn is acting pursuant pretended orders of respondent A. M. Bledsoe, Rear Admiral, U.S. Navy, Commandant 13th Naval District, who in turn is acting pursuant pretended orders of respondent Charles S. Thomas, Assistant Secretary of Defense for the Navy.

III.

That such imprisonment and detention are unlawful and the asserted jurisdiction of the respondents over the person of the petitioner is unlawful in that petitioner entered the service of the U.S. Navy by enlistment in November, 1924, and after 22 years, 3 months and 26 days of service transferred to the Fleet Reserve and was released to inactive duty December 29, 1946, and having completed 30 years

of service for pay purposes on August 19, 1954, he was thereafter placed on the U.S. Navy retired list effective September 1, 1954.

IV.

That on or about the 29th day of December, 1952, your petitioner upon his plea of guilty, was found guilty of the charge of manslaughter by the Superior Court of the State of Washington for Kitsap County in cause No. 30785 and was duly sentenced on said date to the State Penitentiary at Walla Walla, Washington, said offense having been committed in Kitsap County, Washington, May 23, 1952.

V.

That on or about the 31st day of January, 1956, your petitioner was released from said penitentiary into the custody of the Washington State Board of Prison Terms and Paroles on parole; that on said date respondents through their duly authorized agents took petitioner into custody pursuant to purported orders of respondents, recalling petitioner to active duty in the U.S. Navy for the purpose of court-martial; that thereafter and on March 2, 1956, said respondents caused orders to be issued directing the court-martial of your petitioner on a charge of murder or manslaughter.

VI.

That the imprisonment and detention of petitioner and the purported attempt to court-martial petitioner is unlawful in that the crime to which peti-

tioner entered a plea of guilty was not committed while he was on active duty or otherwise under the jurisdiction of the U.S. Navy. That no right in law or statute exists authorizing the U.S. Navy or respondents to recall the petitioner to active duty.

VII.

That the U.S. Navy and respondents are without right under the law or the constitution to again try petitioner for an offense for which he has been once tried, convicted, served the sentence imposed and paid the full penalty therefor. That the actions of respondents are without warrant or authority in law and violate the constitutional and statutory rights of petitioner; that the purported recall to active duty and attempted court-martial of petitioner by respondents bears no reasonable relationship to the maintenance of discipline or regulations of the Naval forces of the United States.

VIII.

That petitioner is without available remedy other than the filing of this petition.

Wherefore, your petitioner respectfully prays that a Writ of Habeas Corpus issue out of this Court and cause directed to respondents commanding them to produce the body of Petitioner before this Court together with the cause of his detention and to do and receive what shall then and there be considered concerning him and then and there have with them this Writ and then and there show cause why peti-

tioner should not be released from further custody and detention.

/s/ PETER J. SMITH,
Petitioner.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,
Attorneys for Petitioner.

United States of America,
State of Washington,
County of King—ss.

Peter J. Smith, being first duly sworn upon oath, deposes and says:

That he is the Petitioner named in the foregoing petition for Writ of Habeas Corpus; that he has read the same, knows the contents thereof, and that the same are true.

/s/ PETER J. SMITH.

Subscribed and sworn to before me this 9th day of March, 1956.

[Seal] /s/ RICHARD REINERTSEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed March 12, 1956.

[Title of District Court and Cause.]

No. 4105

ORDER TO SHOW CAUSE

This matter having come on before the undersigned judge for the above-entitled court, in open court, upon the petition of Peter J. Smith for a Writ of Habeas Corpus, and the court having read said petition, considered the same, and being fully advised in the premises, now therefore,

It Is Hereby Ordered that Rear Admiral A. M. Bledsoe, U.S. Navy, and Capt. J. J. Greytak, U.S. Navy, and Charles S. Thomas, Assistant Secretary of Defense for the Navy, or any other person or persons who may be temporarily acting on their behalf, be and they hereby are ordered to appear before the undersigned judge of the above-entitled court, at his courtroom, in the United States Court House, in the City of Seattle, County of King, State of Washington, at the hour of 2:00 p.m. on Monday, the 2nd day of April, 1956, and to then and there show cause, if any there be, why the prayer of Peter J. Smith should not be granted.

Done in Open Court this 12th day of March, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

/s/ KENNETH P. SHORT,
RUMMENS, GRIFFIN, SHORT
& CRESSMAN,
Attorneys for Petitioner.

[Endorsed]: Filed March 12, 1956.

[Title of District Court and Cause.]

Nos. 4101 and 4105

STIPULATION FOR AND ORDER OF
CONSOLIDATION FOR HEARING

It Is Stipulated by and between counsel for petitioner Boscola, relator Smith and respondents Rear Admiral A. M. Bledsoe, et al., that the above-titled causes, reasonably believed to involve the same general issues at law, may be consolidated for hearing.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States Attorney, Counsel for Respondents, Bledsoe, et al., and Thomas, et al.

DAY & WESTLAND,

By /s/ ROBERT S. DAY,
Counsel for Petitioner, Louis
V. Boscola.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,

By /s/ KENNETH P. SHORT,

Counsel for Relator Peter J.
Smith.

So Ordered.

Done in Open Court this 27th day of March, 1956.

/s/ WILLIAM J. LINDBERG,

United States District Judge.

[Endorsed]: Filed March 28, 1956.

[Title of District Court and Cause.]

Nos. 4101 and 4105

RETURN TO ORDER TO SHOW CAUSE ON
PETITION FOR A WRIT OF HABEAS
CORPUS

Respondents A. M. Bledsoe, Rear Admiral, U.S. Navy, and J. J. Greytak, Captain, U.S. Navy, make the following return to the order to show cause herein and states:

I.

Respondents deny generally the averments of petitioners herein except as hereinbelow specifically admitted.

II.

Petitioners were ordered to active duty in the United States Navy on or about January 31, 1956,

pursuant to authority of the Secretary of the Navy set forth in letter orders Ser 112-167 and Ser 112-168, dated January 25, 1956, copies of which are submitted to this court by stipulation of counsel and are hereby made a part of this return as fully as if set forth at length herein.

III.

The Secretary of the Navy is empowered to order petitioners to active duty pursuant to authority contained in 34 USC 433. A national emergency exists.

IV.

Petitioners are lawfully on active duty and are restrained of their liberty in no other way by any respondent before this court.

For the foregoing reasons, respondents pray the orders to show cause be quashed and the petitions dismissed.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Assistant U.S. Attorney,
Counsel for Respondents.

State of Washington,
County of King—ss.

A. M. Bledsoe, Rear Admiral, United States Navy, being first duly sworn on oath, deposes and says that he is one of the respondents in each of the above-

named causes, that he has read the foregoing return and that he believes the contents of same to be true.

/s/ ALBERT M. BLEDSOE,
Rear Admiral, U. S. Navy.

Subscribed and sworn to before me this 30th day of March, 1956.

[Seal] /s/ RICHARD REINERTSEN,
Notary Public in and for the State of Washington,
Residing at Mountlake Terrace.

[Endorsed]: Filed April 2, 1956.

[Title of District Court and Cause.]

Nos. 4101 and 4105

STIPULATION OF FACTS

It is stipulated by and between counsel for petitioner Boscola and relator Smith and repondents Rear Admiral Bledsoe and Captain Greytak that the following facts are true and may be so considered without further formal proof thereof.

Re: Louis V. Boscola, No. 4101

Louis V. Boscola, Chief Musician, United States Navy, enlisted in the United States Regular Army on June 9, 1915 and, through successive (although broken) enlistments, completed over thirty (30)

years' service in regular components (service after May 2, 1921, being in the United States Navy) on May 31, 1947, at which time he was placed on the retired list of the Regular Navy. Petitioner, in January, 1954, was charged with the crime of carnal knowledge on January 8, 1954, in Kitsap County, Washington. Petitioner pled guilty in January, 1954, and was sentenced to serve a term in the Washington State Penitentiary. Petitioner was released on parole to the supervision of the Washington State Board of Prison Terms and Paroles on January 31, 1956. Petitioner was ordered to active duty in the United States Navy pursuant to orders, copy of which is appended as Attachment 1, and is now on active duty at the Naval Receiving Station, Seattle, Washington (popularly known as Pier 91), under the direct command of respondent Greytak and the indirect commend of respondent Greytak's military superior, respondent Bledsoe.

On March 2, 1956, petitioner was, pursuant to UCMJ 35 (50 USC 606), served with a copy of the Charge and Specification alleging a violation of UCMJ 120 (50 USC 714). Such charge and Specification charges and is based upon the same act (to wit, carnal knowledge) as that for which petitioner was confined by the State of Washington.

This stipulation of facts is not exclusive and shall not be a bar to the introduction of any portion of Louis V. Boscola's service record, subject to the general rules as to admissibility of evidence.

Re: Peter J. Smith, No. 4105

Peter J. Smith, Chief Torpedoeman, United States Navy, enlisted in the United States Regular Navy on November 17, 1924, and through successive enlistments completed twenty-two (22) years, three (3) months, twenty-six (26) days service on December 15, 1946, at which time he was transferred to the Fleet Reserve of the Regular Navy. Petitioner was charged with the crime of manslaughter on May 23, 1952, in King County, Washington. Petitioner pled guilty in September, 1952, and was sentenced to serve a term in the Washington State Penitentiary. Petitioner thereafter completed thirty (30) years naval service and was transferred to the retired list of the United States Navy on September 1, 1954. Petitioner was released on parole to the supervision of the Washington State Board of Prison Terms and Paroles on January 31, 1956. Petitioner was ordered to active duty in the United States Navy pursuant to orders, copy of which is appended as Attachment 2, and is now on active duty at the Naval Receiving Station, Seattle, Washington, (popularly known as Pier 91), under the direct command of respondent Greytak and the indirect command of respondent Greytak's military superior, respondent Bledsoe.

On March 2, 1956, petitioner was, pursuant to UCMJ 35 (50 USC 606), served with a copy of the Charge and Specification alleging a violation of UCMJ 119 (50 USC 713). Such Charge and Specification charges and is based upon the same act (to

wit, manslaughter) as that for which petitioner was confined by the State of Washington.

This stipulation of facts is not exclusive and shall not be a bar to the introduction of any portion of Peter J. Smith's service record, subject to the general rules as to admissibility of evidence.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States Attorney, Counsel for Re-
spondents, Bledsoe, et al., and Thomas, et al.

DAY & WESTLAND,

By /s/ ROBERT S. DAY,
Counsel for Petitioner, Louis
V. Boscola.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,

By /s/ R. M. OSWALD,
Counsel for Relator, Peter J.
Smith.

Attachment 1

Headquarters
Thirteenth Naval District
Seattle 99, Washington

Code 112

P16-4:bi

Ser 112-167

25 Jan 56

From: Commandant, Thirteenth Naval District.

To: Boscola, Louis Vincey, 214 30 88, MUC,
USN Retired; Inmate, Washington State
Penitentiary, Walla Walla, Washington.

Subj: Recall to active duty.

Ref: (a) SECNAV ltr JAG:I:2:EJB:cmr Bos-
cola Louis V. of 15 Sep 1954;
(b) BUPERS Manual, ART C-10330(1);
(c) JAG ltr JAG:I:2:WJM:bp of 11 Jan
1956;
(d) ART 2(4), UCMJ 1951;
(e) ART H-1805, BUPERS Manual.

1. In accordance with the authority contained in references (a), (b), (c) and (d), on or about 31 January, 1956, when released by the Warden, Washington State Penitentiary, Walla Walla, Washington, you are at such time, ordered to active duty in the U.S. Navy. You will report to the Guard who delivers these orders and from such time as these orders are delivered to you, you will consider yourself in an active duty status.

2. Upon reporting to the Guard as directed by paragraph 1 above, you will proceed in his custody immediately and report to the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, for appropriate disposition and to await further orders and instructions from the Commandant, Thirteenth Naval District.

3. Upon reporting to the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, you will further report to the Medical Officer, U.S. Naval Station, Building No. 61, Seattle, Washington, for a physical examination.

4. This active duty is with full pay and allowances and is chargeable to appropriation 1761453.16 MPN 1956, Expenditure Account Number, 71130. Travel is chargeable to appropriation 1761453.18, MPN 1956, Object Class 029, Expenditure Account 74132, Bureau Control and Activity Number 22/31600.

5. In connection with your active duty pay and allowances, the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, by copy of these orders, is directed to forward the following items to the Officer-in-Charge, Naval Accounts Disbursing Officer, Thirteenth Naval District, Seattle 99, Washington:

- (a) Original and 2 copies NAVSANDA Form 511 (Order to enter account);
- (b) W-4 Form;
- (c) NAVPERS 668 and NAVSANDA Form 545, if applicable;

(d) Original and 3 copies of the "Notice of Re-entrance into Active Military Service," required by reference (e), together with the original and 3 copies of these orders, complete with all endorsements.

S. H. AMBRUSTER,
By Direction.

Copy to:

SECNAV

JAG

BUPERS

NAVFINCEN CLEVE

CO RECSTA SEATTLE

MEDICAL OFFICER

Attachment 2

Headquarters
Thirteenth Naval District
Seattle 99, Washington

Code 112

P16-4:bi

Ser 112-168

25 Jan 1956

From: Commandant, Thirteenth Naval District.

To: Smith, Peter J., 371 59 27, TMTC, USN
Retired; Inmate, Washington State Peni-
tentiary, Walla Walla, Washington.

Subj: Recall to active duty.

- Ref: (a) SECNAV ltr JAG:I:2:EBJ:dvs Smith, Peter J. of 10 Feb 1954;
(b) BUPERS Manual, ART C-10330(1);
(c) JAG ltr JAG:I:2:WJM:bp of 11 Jan 1956;
(d) ART 2(4) UCMJ 1951;
(e) ART H-1805, BUPERS Manual.

1. In accordance with the authority contained in references (a), (b), (c) and (d), on or about 31 January, 1956, when released by the Warden, Washington State Penitentiary, Walla Walla, Washington, you are at such time, ordered to active duty in the U.S. Navy. You will report to the Guard who delivers these orders and from such time as these orders are delivered to you, you will consider yourself in an active duty status.

2. Upon reporting to the Guard as directed by paragraph 1 above, you will proceed in his custody immediately and report to the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, for appropriate disposition and to await further orders and instructions from the Commandant, Thirteenth Naval District.

3. Upon reporting to the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, you will further report to the Medical Officer, U.S. Naval Station, Building No. 61, Seattle, Washington, for a physical examination.

4. This active duty is with full pay and allowances and is chargeable to appropriation 1761453.16, MPN 1956, Expenditure Account Number 71130.

Travel is chargeable to appropriation 1761453.18, MPN 1956, Object Class 029, Expenditure Account 74132, Bureau Control and Activity Number 22/31600.

5. In connection with your active duty pay and allowances, the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, by copy of these orders, is directed to forward the following items to the Officer-in-Charge, Naval Accounts Disbursing Officer, Thirteenth Naval District, Seattle 99, Washington:

(a) Original and 2 copies NAVSANDA Form 511 (Order to enter account);

(b) W-4 Form;

(c) NAVPERS 668 and NAVSANDA Form 545, if applicable;

(d) Original and 3 copies of the "Notice of Re-entrance into Active Military Service," required by reference (e), together with the original and 3 copies of these orders, complete with all endorsements.

S. H. AMBRUSTER,

By Direction.

Copy to:

SECNAV

JAG

BUPERS

NAVFINCEN CLEVE

CO RECSTA SEATTLE

MEDICAL OFFICER

[Endorsed]: Filed April 10, 1956.

[Title of District Court and Cause.]

Nos. 4101 and 4105

MEMORANDUM OPINION

This matter is before the court after a hearing upon a return to an order to show cause why the prayer of petitioner should not be granted, which order was issued upon the filing of a petition for writ of Habeas corpus in each of the above cases. By stipulation the cases were consolidated for hearing, common questions of law and fact being present.

Both Boscola and Smith having completed thirty years in the Navy as enlisted men were retired under the provisions of Title 34 U.S.C.A. § 431. Both were prosecuted, pleaded guilty and were imprisoned in the Washington State Penitentiary for offenses committed several years after leaving active service in the Navy, Smith having been in the Fleet Reserve rather than on the retired list at the time of committing his offense. Boscola was charged with carnal knowledge and Smith with manslaughter.

Following conviction and imprisonment by the State of Washington the Navy concluded that both men should be ordered into active service under the provisions of 34 U.S.C.A. § 433 for the purpose of court-martial because of the serious nature of the offense in each case.

On the day they were released on parole from the Washington State Penitentiary each was met at the gate of the penitentiary by a Chief Petty Officer of

the Navy and served with orders recalling them to active duty and directing them to report to the guard delivering the orders and proceed in his custody to the United States Naval Receiving Station at Seattle, Washington, to await further orders. On March 7, 1956, each was ordered to restricted status, which status was defined in special instructions on the reverse side of their orders (See Exhibits 1 and 6), as follows:

“The Limits of Your Restriction Are Defined as Your Barracks and the Mess Hall of the Receiving Station Only.”

Boscola on March 7, 1956, and Smith on March 12, 1956, filed petitions for writs of habeas corpus alleging that each was being illegally restrained by the Navy and praying for release from further custody and detention.

Petitioners contend, first, that the Navy has no authority to recall them to active duty solely for the purpose of subjecting them to trial by general court-martial, and second, that the Navy does not have court-martial jurisdiction over a retired enlisted man for crimes such as allegedly committed by them several years after their separation from active service.

Respondents take the position with respect to petitioners' first contention that Boscola and Smith are on active duty in the United States Navy pursuant to competent orders, that the restraint upon their liberty is a moral restraint resulting from

obedience to orders rather than a physical restraint as would constitute custody sufficient to support a discharge under a writ of habeas corpus. In their return respondents allege in paragraph IV:

“Petitioners are lawfully on active duty and are restrained of their liberty in no other way by any respondent before this court.”

Their position as to custody apparently is based upon the case of *Wales v. Whitney*, 114 U. S. 564, which case still appears to be the law. However, before determining whether the facts as to restraint in the present cases are such as to make the rule announced in *Wales v. Whitney*, *supra*, applicable it would appear necessary to first decide whether petitioners have been lawfully called back to active duty by the Navy.

In their brief on this issue,

“Respondents concede that, if their orders to active duty be without authority, petitioners are entitled to release from active duty in the same sense that inductees (not lawfully inducted) or deportees (who are really entitled to be at liberty) are entitled to be released from the control of those who order their activities.”

At the time of hearing, while insisting that the fact was not material, respondents stipulated that the purpose of recalling the petitioners to active duty was for the purpose of court-martial. The facts, as they are disclosed from the written stipulation and copies of letter orders to active duty attached

thereto, as well as from the testimony of petitioners and the exhibits admitted in evidence do not disclose that petitioners were recalled for any particular duty or that any duty has been assigned them. Rather, the evidence as well as the lack thereof would tend to establish that petitioners were recalled ostensibly for active duty but in reality for no duty and actually to accomplish an undesirable discharge (Exhibit 4).

It is agreed that the authority, if it existed to order petitioners into active service is derived from 34 U.S.C.A. §433 (Mar. 3, 1915, c. 83, 38 Stat. 941; Aug. 29, 1916, c. 417, 39 Stat. 591), which provides:

“The Secretary of the Navy is authorized in time of war, or when a national emergency exists, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the pay and allowances authorized by section 26 of Title 37, except as otherwise provided in the next section.”

As the court understands respondents' contention it is that under said statute, in time of war or when a national emergency exists, the Secretary of the Navy is authorized to call any enlisted man on the retired list into active service without qualification. Assuming, without conceding that the national emergency declared by President Truman of December 16, 1950, is still in effect for the purposes of said statute, such an interpretation would in effect ignore

the words "for such duty as he may be able to perform." It is a general rule that the courts, in the interpretation of a statute, may not take, strike, or read anything out of a statute, or delete, subtract, or omit anything therefrom. Rather, effect should, if possible, be accorded to every word and phrase. 50 Am. Jur. §231. Hence, a construction will be avoided which would render a part of a statute superfluous, or which would give to a particular word or phrase a meaning that adds nothing to the statute. 50 Am. Jur. §359.

It follows that a plain and reasonable construction of the language used requires that some meaning be given the words "for such duty." Congress must have intended that an enlisted man on the retired list, if called to active service, would be called for the purpose of performing some duty. Can it be contended in good faith that awaiting trial by court-martial or making application for undesirable discharge because of an offense committed years after separation from active service and unrelated to the naval forces, activity or business, was a type or category of duty contemplated by Congress when the Secretary of Navy was authorized in time of war or national emergency to recall retired enlisted men into active service for such duty as they might be able to perform. The court believes not.

Respondents cite U. S. ex rel., *Pasela v. Fenno*, 167 F. 2d 593, in support of their position that petitioners could lawfully be recalled to active duty for purpose of courts-martial. It must be admitted that

the court's reasoning in the language used, namely, "Thus appellant could lawfully be recalled to active duty, nothing in the statute or legislative history indicating that a call to active duty solely for purposes of court-martial proceedings is not permissible," tends to sustain their contention. However, there the court was interpreting a different statute—34 U.S.C. §583c (1946 edition)—applicable to the Naval Reserve, which provided:

"Any member of the Naval Reserve, including those on the honorary retired list created by section 855h of this title, or who may have been retired, may be ordered to active duty by the Secretary of the Navy in time of war or when in the opinion of the President a national emergency exists and may be required to perform active duty throughout the war or until the national emergency ceases to exist; but in time of peace, except as otherwise provided in the Naval Reserve Act of 1938, he shall be ordered to or continued on active duty with his own consent only: Provided, That the Secretary of the Navy may release any member from active duty either in time of war or in time of peace. (June 25, 1938, ch. 690, title I, §5, 52 Stat. 1176; June 13, 1939, ch. 205, §12(d), 53 Stat. 821; June 24, 1941, ch. 233, §2, 55 Stat. 261; Aug. 4, 1942, ch. 547, §15(b), (d), (e), 56 Stat. 739.)"

It will be noted that the language applicable varies substantially from that used in 34 U.S.C.A.

§433, and permits of a varied interpretation. Further, while this court has the utmost respect for the authority and opinions of the Court of Appeals of the Second Circuit it appears that the reasoning followed in the language quoted is not compelling as applied to the statute and facts here involved. It should be noted further that in that case certiorari was granted by the Supreme Court and subsequently the review was dismissed by stipulation.

Respondents further contend that this court has no right to examine into the status of petitioners within the naval service, and cite as authority *U. S. ex rel., Orloff v. Willoughby*, 345 U. S. 83. In that case the petitioner admitted he was lawfully inducted into the Army but sought release because he had not been assigned to specialized duties nor given the commissioned rank to which he claimed to be entitled by the circumstances of his induction. Here we are concerned with the lawfulness of the recall to duty and not with an assignment to duty after lawful induction or recall. The *Orloff* decision, while concerned with an issue differing materially from that here involved would in certain of its language appear to challenge respondents' position rather than support it. The court there stated (page 88):

“To separate particular professional groups from the generality of the citizenship and render them liable to military service only because of their expert callings and, after induction, to divert them from the class of work for which they were conscripted would raise ques-

tions not only of bad faith but of unlawful discrimination. We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction. It is not conceded, however, that particular duty orders within the general field are subject to judicial review by habeas corpus.”

This language would seem to sustain the proposition that the Navy may not lawfully order or recall an enlisted man on the retired list to active duty under a statute clearly anticipating a recall for the performance of further duty as a guise for an unrelated purpose, namely, for the avowed and only purpose of obtaining his consent to an undesirable discharge wholly and completely from further duty or in the alternative to subject him to court-martial, presumably with the same objective.

It is the opinion of the court that under the evidence and applicable law in these cases the petitioners have been unlawfully called into active duty and are entitled to be released therefrom.

Having so concluded the issues involved in petitioners' second broad contention as to the court-martial jurisdiction of the Navy over retired enlisted men for offenses such as here involved under the Code of Military Justice, particularly 50 U.S.C.A. §552(4), are not reached. The respondents having taken the position, as they do in their return,

that petitioners are lawfully on active duty and are restrained of their liberty in no other way, it must be assumed that if petitioners' recall to active duty was unlawful respondents will impose no further restraint upon them in connection with any courts-martial proceedings now instituted and pending against them as disclosed by the record before this court.

The court for the reasons above set forth will sustain the writ and discharge the petitioners.

Dated May 1, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed May 1, 1956.

[Title of District Court and Cause.]

No. 4101

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on regularly before the above-entitled court, upon a return to an Order to Show Cause why the prayer of petitioner's Petition for Writ of Habeas Corpus should not be granted, and testimony having been introduced, and argument of counsel having been heard, Robert S. Day, of Day and Westland, appearing as attorney for petitioner Boscola, Edward J. McCormick, Jr., Assistant United States Attorney, and Joe J. Munster, Captain, United States Navy, appearing for re-

spondents Greytak and Bledsoe; and the court having considered the testimony, argument of counsel, briefs, and memoranda of authority presented by both parties, and all of the exhibits introduced into evidence, and being fully advised in the premises, now therefore makes and enters the following:

Findings of Fact

I.

That on May 29, 1946, petitioner Boscola completed thirty years of service in the United States Navy for pay purposes, and that on May 31, 1947, petitioner Boscola was released from active duty in the United States Navy and was placed on the retired list of the United States Navy. That at the time of his retirement, petitioner Boscola held the rank of Chief Musician.

II.

That subsequently, petitioner was charged with the crime of carnal knowledge in the Superior Court of the State of Washington, in and for Kitsap County, under Docket No. 33091, said crime allegedly having been committed on January 8, 1954. That petitioner entered a plea of guilty to said charge and was sentenced to a maximum of twenty years in the Washington State Penitentiary at Walla Walla, Washington. That on January 31, 1956, petitioner Boscola was released from the Washington State Penitentiary on parole.

III.

That on the same day, petitioner Boscola was met at the gate of the Washington State Penitentiary by a Chief Petty Officer of the United States Navy, and served with orders recalling him to active duty, and directing him to report to the guard delivering the orders and proceed in his custody to the United States Naval Receiving Station in Seattle, Washington, to await further orders.

IV.

That the written stipulation of facts and copies of letter orders to active duty attached thereto, as well as the testimony of petitioner and other exhibits admitted into evidence, show that petitioner was not recalled into active duty in the Navy for any particular duty, and that no duty has been assigned to petitioner since his recall to active duty. That the evidence establishes that petitioner Boscola was recalled ostensibly for active duty, but in reality for no duty, and actually to accomplish an undesirable discharge.

Done by the Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge of the District Court.

From the foregoing Findings of Fact, the Court now makes and enters the following:

Conclusions of Law

That petitioner Boscola has been unlawfully called into active duty in the United States Navy, and is entitled to be released therefrom.

Done by the Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge of the District Court.

Presented by:

DAY & WESTLAND,
Attorneys for Petitioner.

Approved as to form this 7th day of May, 1956.

/s/ EDWARD J. McCORMICK, JR.,
Attorney for Respondents.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1956.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4101

UNITED STATES, ex rel., LOUIS v. BOSCOLA,

Petitioner,

vs.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy;
CAPT. J. J. GREYTAK, U. S. Navy; and
CHARLES S. THOMAS, Assistant Secretary
of Defense for the Navy,

Respondents.

ORDER SUSTAINING WRIT OF HABEAS
CORPUS AND ORDERING RELEASE OF
PETITIONER

This Matter having come on regularly before the
above-entitled court, upon a return to an Order to
Show Cause why a Writ of Habeas Corpus should
not be granted, and the court having previously
hereto entered Findings of Fact and Conclusions of
Law, now therefore,

It Is Hereby Ordered, Adjudged and Decreed that
the petition of Louis V. Boscola for a Writ of
Habeas Corpus should be and hereby is sustained,
and

It Is Further Ordered, Adjudged and Decreed
that respondents A. M. Bledsoe, Rear Admiral,
United States Navy, and J. J. Greytak, Captain,

United States Navy, shall forthwith release Louis v. Boscola from active duty in the United States Navy.

Done by the Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge of the District Court.

Presented by:

DAY & WESTLAND,
Attorneys for Petitioner.

Approved as to form this 7th day of May, 1956.

/s/ EDWARD J. McCORMICK, JR.,
Attorney for Respondents.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

No. 4105

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Be It Remembered this matter came on duly and regularly for trial and was tried on April 12 and 13, 1956, before the undersigned Judge of the above-entitled court sitting without a jury upon the petition of relator Peter J. Smith for Writ of Habeas Corpus which was consolidated with a similar petition in that certain cause entitled "United States ex rel., Louis V. Boscola, Petitioner, vs. Rear Admiral

A. M. Bledsoe, U. S. Navy; Captain J. J. Greytak, U. S. Navy, and Charles S. Thomas, Assistant Secretary of Defense for the Navy, Respondents," being this court's cause No. 4101, relator Smith appearing in person and by Rummens, Griffin, Short & Cressman, his attorneys and the respondents appearing by Charles P. Moriarity, U. S. Attorney by Edward J. McCormick, Jr., Assistant U. S. Attorney, and Joe J. Munster, Captain, U. S. Navy, and the court having examined the records and files herein, the stipulation of facts on file herein, the testimony of witnesses and certain documentary evidence admitted and the oral stipulations of counsel in open court and having heard the arguments of respective counsel and having considered the briefs of respective counsel on file herein and having take the matter under advisement and on May 1, 1956, having filed a Memorandum Opinion herein directing the issuance of a Writ of Habeas Corpus herein and releasing and discharging petitioner from active duty, now in conformity therewith, this court does make the following

Findings of Fact

I.

In accordance with the written stipulation of facts on file herein the court finds that relator Peter J. Smith, Chief Torpedoeman, United States Navy, enlisted in the United States Regular Navy on November 17, 1924, and through successive enlistments completed twenty-two (22) years, three (3)

months, twenty-six (26) days service on December 15, 1946, at which time he was transferred to the Fleet Reserve of the Regular Navy. Petitioner was charged with the crime of manslaughter on May 23, 1952, in Kitsap County, Washington. Petitioner pled guilty in September, 1952, and was sentenced to serve a term in the Washington State Penitentiary. Petitioner thereafter completed thirty (30) years naval service and was transferred to the retired list of the United States Navy on September 1, 1954. Petitioner was released on parole to the supervision of the Washington State Board of Prison Terms and Paroles on January 31, 1956. Petitioner was ordered to active duty in the United States Navy, and is now on active duty at the Naval Receiving Station, Seattle, Washington (popularly known as Pier 91), under the direct command of respondent Greytak and the indirect command of respondent Greytak's military superior, respondent Bledsoe.

On March 2, 1956, petitioner was, pursuant to UCMJ 35 (50 U.S.C. 606), served with a copy of the Charge and Specification alleging a violation of UCMJ 119 (50 U.S.C. 713). Such Charge and Specification charges and is based upon the same act (to wit, manslaughter) as that for which petitioner was confined by the State of Washington.

II.

The court further finds that following conviction and imprisonment by the State of Washington the Navy concluded that both men should be ordered into active service under the provisions of 34

U.S.C.A. Sec. 433 for the purpose of court-martial because of the serious nature of the offense in each case.

On the day they were released on parole from the Washington State Penitentiary each was met at the gate of the penitentiary by a Chief Petty Officer of the Navy and served with orders recalling them to active duty and directing them to report to the guard delivering the orders and proceed in his custody to the United States Naval Receiving Station at Seattle, Washington, to await further orders. On March 7, 1956, each was ordered to restricted status, which status was defined in special instructions on the reverse side of their orders (See Exhibits 1 and 6), as follows:

“The Limits of Your Restriction Are Defined as Your Barracks and the Mess Hall of the Receiving Station Only.”

III.

From the oral stipulation of counsel in open court, the written stipulation above referred to together with its attachment and from the testimony of the petitioners and exhibits admitted in evidence the court finds that petitioners were not recalled for any particular duty and that no duty has been assigned them by respondents but that relator was recalled ostensibly for active duty but in reality for no duty and for the purpose of trial by court-martial for manslaughter committed May 23, 1952.

Done in Open Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

From the foregoing Findings of Fact, the court does deduce the following

Conclusions of Law

I.

That this court is possessed of jurisdiction of the parties and subject matter of this action.

II.

Relator Peter J. Smith was unlawfully recalled into active duty by the United States Navy and is entitled to be released from active duty and further restraint imposed upon him by respondents.

Done in Open Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,
Attorneys for Relator.

Presented by:

/s/ KENNETH P. SHORT.

Approved as to form:

/s/ EDWARD J. McCORMICK, JR.,
Asst. U. S. Attorney.

[Endorsed]: Filed May 8, 1956.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4105

UNITED STATES OF AMERICA on the Relation
of Peter P. Smith,

Relator,

vs.

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy; A. M. BLEDSOE, Rear
Admiral, U. S. Navy, and J. J. GREYTAK,
Captain, U. S. Navy,

Respondents.

JUDGMENT

Be It Remembered this matter came on duly and regularly for trial and was tried on April 12 and 13, 1956, before the undersigned Judge of the above-entitled court sitting without a jury upon the petition of relator Peter J. Smith for Writ of Habeas Corpus which was consolidated with a similar petition in that certain cause entitled "United States ex rel., Louis V. Boscola, Petitioner, vs. Rear Admiral A. M. Bledsoe, U. S. Navy; Captain J. J. Greytak, U. S. Navy, and Charles S. Thomas, Assistant Secretary of Defense for the Navy, Respondents." being this court's cause No. 4101, relator Smith appearing in person and by Rummens, Griffin. Short & Cressman, his attorneys and the re-

spondents appearing by Charles P. Moriarity, U. S. Attorney by Edward J. McCormick, Jr., Assistant U. S. Attorney, and Joe J. Munster, Captain U. S. Navy, and the court having examined the records and files herein, the stipulation of facts on file herein, the testimony of witnesses and certain documentary evidence admitted and the oral stipulations of counsel in open court and having heard the arguments of respective counsel and having considered the briefs of respective counsel on file herein and having taken the matter under advisement and on May 1, 1956, having filed a Memorandum Opinion herein directing the issuance of a Writ of Habeas Corpus herein and discharging the petitioner from the custody of respondents, and having heretofore made, rendered and entered Findings of Fact and Conclusions of Law, it is by the court

Ordered, Adjudged and Decreed that the petition of relator Peter J. Smith for Writ of Habeas Corpus be and the same is hereby granted and respondents be and they hereby are directed to forthwith release and discharge said relator from any and all active duty status and further restraint.

Done in Open Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,
Attorneys for Relator.

Presented by:

/s/ KENNETH P. SHORT.

Approved as to form:

/s/ EDWARD J. McCORMICK, JR.,
Asst. U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

No. 4101

NOTICE OF APPEAL

To: Louis V. Boscola, petitioner, and Day and Westland, Box 514, Kennewick, Washington, his attorneys, and the Clerk of the above-entitled Court.

Notice Is Hereby Given that Rear Admiral A. M. Bledsoe, et al., Respondents above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment ordering respondents to release petitioner from active duty in the United States Navy entered on May 8, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney,
Attorneys for Respondents.

[Endorsed]: Filed July 3, 1956.

[Title of District Court and Cause.]

No. 4105

NOTICE OF APPEAL

To: Peter J. Smith, relator, and Rummens, Griffin, Short & Cressman, 1107 American Building, Seattle, Washington, his attorneys, and the Clerk of the above-entitled Court.

Notice Is Hereby Given that Charles S. Thomas, et al., Respondents above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment ordering respondents to release and discharge relator from any and all active duty status and further restraint entered on May 8, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney,
Attorneys for Respondents.

[Endorsed]: Filed July 3, 1956.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4101

UNITED STATES, ex rel., LOUIS V. BOSCOLA,
Petitioner,

vs.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy,
CAPTAIN J. J. GREYTAK, U. S. Navy, and
CHARLES S. THOMAS, Assistant Secretary
of Defense for the Navy,

Respondents.

No. 4105

UNITED STATES OF AMERICA, on the Rela-
tion of PETER J. SMITH,

Relator,

vs.

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy, A. M. BLEDSOE, Rear
Admiral, U. S. Navy, and J. J. GREYTAK,
Captain, U. S. Navy,

Respondents.

TRANSCRIPT OF PORTION
OF PROCEEDINGS

April 13, 1956

Before: Honorable William J. Lindberg,
United States District Judge.

Appearances:

ROBERTS S. DAY, of
DAY & WESTLAND,

Appeared for and on Behalf of Petitioner
Boscola.

KENNETH P. SHORT, and
TRACY E. GRIFFIN, of
RUMMENS, GRIFFIN, SHORT & CRESS-
MAN,

Appeared for and on Behalf of Relator
Smith.

EDWARD J. McCORMICK, JR.,

Assistant United States Attorney, West-
ern District of Washington.

JOE MUNSTER, JR.,

Captain, U. S. Navy,

Appeared for and on Behalf of Re-
spondents.

PROCEEDINGS

(Whereupon, testimony and other evidence having been offered and received, colloquy and argument having been had by and between respective counsel, the following proceedings were then had, to wit:)

The Court: I will give you a ten minute recess.

(Whereupon, at 10:40 o'clock, a.m., a recess was had until 10:51 o'clock, a.m., on the 13th day of April, 1956, at which time, Counsel and

Parties heretofore noted being present, the following proceedings were had, to wit:)

Mr. McCormick: If it please Court, we are prepared to cut the accordion concert and stipulate that the purpose of recalling the Petitioner to active duty was for the purpose of court-martial.

Counsel for Petitioner (Respondent) denies the materiality and, if your Honor admits the stipulation, we take exception.

The Court: As I understand, you deny the materiality or relevency of such a stipulation but, be it material or relevant, you do so stipulate?

Mr. McCormick: Yes, sir.

The Court: I think that covers it.

Reporter's Certificate

I, Earl V. Halvorson, Official Court Reporter for the United States District Court, for the Eastern and Western Districts of Washington, do hereby certify that the foregoing is a true and correct extract of proceedings had in the within-entitled and numbered causes on the date hereinbefore set forth; and I do further certify that the foregoing has been transcribed by me or under my direction.

/s/ EARL V. HALVORSON.

(Admitted April 12, 1956)

214 30 28 BOSCOLA, Louis Vind
 (SERVICE NUMBER) (LAST NAME) (FIRST NAME) (MIDDLE INITIAL)
 CMUS USN USN-1 USN-SV USNR USNR-SV RET.
 (RATING) (CLASS)

1. ACCEPTED FOR ENLISTMENT AT Bremerton, Wash. 2-27-40
 (PLACE) (DATE)
2. INDUCTED AT _____
 (PLACE) (DATE)
3. ORDERED TO ACTIVE DUTY FROM _____
 (PLACE) (DATE)
4. HOME SHOWN IN SERVICE RECORD _____
 (CITY AND STATE)

NOTE: USN and USNR enlisted for immediate active duty - use 1 above.
 USN-1, USN-SV, USNR-SV - Use 2 and enter location of local draft board to which individual first reported for delivery to induction station.
 USNR ordered from inactive duty - Use 3 and enter address to which orders to active duty were addressed.
 ALL CLASSES - Use 4 in addition to others required, only when individual is entitled to transportation in kind to home of record.

5. COMPLETED 30 YEARS SERVICE FOR PAY PURPOSES 5-29-46
 (NO.) (DATE)
6. THE ABOVE NAMED INDIVIDUAL IS THIS DATE 31 May 1947
 (DATE)

RELEASED FROM ACTIVE DUTY DISCHARGED WITH HON RAD
 (CHARACTER OF DISCHARGE)

7. REASON AND AUTHORITY
NAV
ALNav 453-46

Elect TA Bremerton, Wash. place accep for enl.

Service record forward to Comdt., THIRTEENTH Naval District. 5-31-47.

PLAINTIFF EXHIBIT
 CAUSE

W. F. JOHNSON, CH. SR. CH. USN
 (NAME AND SIGNATURE)

ASST PERSONNEL OFFICER (See Art. 2025 (2) N. R.)

U. S. NAVRECSTA., SEATTLE, WASH.
 (NAME AND LOCATION OF ACTIVITY FROM WHICH REPORTED)

PLAINTIFF'S EXHIBIT NO. 3

(Admitted April 12, 1956.)

JAG:I:2EJB:cmr

Boscola, Louis V.

15 Sep 1954

From: The Secretary of the Navy

To: Chief of Naval Personnel

Subj: Boscola, Louis Vincey, 214 30 88, Muc,
USN (Ret)

Ref: (a) Ltr Chief of NavPers to SecNav
(JAG), Pers-B221e-wc MM 214 30 88
of 19 August 1954

(b) BuPers Manual, Part C-10330(1)

(c) SecNavInst 5810.1 dtd 5 March 1953

1. Receipt of reference (a) requesting permission on behalf of Commandant Thirteenth Naval District, to try subject-named man by court-martial is acknowledged. In view of the serious nature of the offense it is considered that this case comes within the excepted class of cases referred to in reference (c) and, accordingly permission to try Boscola by court-martial is hereby granted.

2. While not essential, it is considered that recall to active duty as authorized by reference (b) is appropriate; however, the final decision as to this

aspect of the case is left to the administrative discretion of the Bureau of Naval Personnel.

J. H. SMITH, JR.,
Assistant Secretary of the
Navy for Air.

Copy to:
ComThirteen

PLAINTIFF'S EXHIBIT NO. 4

(Admitted April 12, 1956.)

Department of the Navy
Bureau of Naval Personnel
Washington 25, D. C.

Pers-B221b:mh

23 Sept 1954

From: Chief of Naval Personnel
To: Commandant Thirteenth Naval District
Subj: Boscola, Louis Vincey, 214 30 88, Muc.
USN (Ret), Procedure to be followed in
case of
Ref: (a) Com13 ltr ser 11B-1368 of 26 May 1954
(b) SecNavInst 5810.1
(c) SecNav ltr to CNP JAG:I:S:EJB:cmr
Boscola, Louis V. dtd 15 Sep 54
(d) Art. C-10330(1), BuPers Manual
(e) Uniform Code of Military Justice
(f) Art C-10312 BuPers Manual

Encl: (1) Sample copy of request for undesirable discharge.

1. Reference (a) reported that subject man was convicted by the Superior Court for the State of Washington in and for the County of Kitsap, on a charge of Carnal Knowledge, which involved sexual relations with his 13-year-old adopted daughter. Boscola was sentenced to the Washington State Penitentiary, Walla Walla, Washington, for a term of not more than twenty years.

2. It has been held that in the absence of express statutory authority a person in Boscola's category cannot be involuntarily discharged as undesirable by administrative action. In view of the serious nature of Boscola's offense the Secretary of the Navy considered that this case came within the excepted class of cases referred to in reference (b), and by reference (c), granted the Commandant Thirteenth Naval District, permission to try Boscola by General Court-Martial in order that the following procedures, as proposed by the Chief of Naval Personnel, may be instituted.

a. When eligible for release from prison, Boscola to be ordered to active duty pursuant to reference (d) and take into naval custody

b. Boscola to be confronted with charge and specification and warned of his rights in accordance with Art. 31 of reference (e).

c. Boscola to be informed that a signed request for undesirable discharge in lieu of trial by General

Court-Martial, similar to that set forth in enclosure (1), would probably receive favorable action.

d. If he submits such a signed request, Boscolo's discharge as undesirable by reason of misconduct is directed upon approval of the request by the Commandant Thirteenth Naval District, without further reference to the Chief of Naval Personnel. The discharge certificate shall cite this letter and the signed request as Authority for Discharge.

e. If Boscola does not submit such a signed request, proceedings to be instituted with a view to trying him by General Court-Martial.

3. It is requested that the applicable procedures outlined in paragraph 2 be instituted in Boscola's case and that the Chief of Naval Personnel (Attn Bers B221b) be advised of any action taken.

/s/ H. S. ROBERTS,
 H. S. ROBERTS,
 By Direction.

PLAINTIFF'S EXHIBIT NO. 5

U. S. Naval Station
 Seattle, Washington

NS—Seattle

Ser: 2220-09:stj

14 February 1956

From: Commanding Officer

To: Commandant, Thirteenth Naval District
 (Code 22)

Subj: Boscola, Louis V., 214 30 88, Chief musician, U. S. Navy (Retired); recommendation for trial by general court-martial in the case of

Ref: (a) Chapter VII, para 33(i), MCM, 1951
(b) Article 33, UCMJ
(c) SecNav Instruction 5813.1 dtd 15 Sept 1954
(d) BuPers ltr Pers B221b-mh dtd 23 Sept 1954

Encl: (1) Original service record in the case of Boscola
(2) Investigating Officer's report, DD Form 457, dtd 14 Feb 1956

1. In accordance with references (a) through (d), it is recommended that Boscola, Louis V., 214 30 88, chief musician, U. S. Navy (Retired) be brought to trial by general court-martial on the following charge: Violation of the Uniform Code of Military Justice, Article 120 (carnal knowledge), one specification.

2. In view of the serious nature of the charge in this case and the fact that it is an offense which comes within the excepted class of cases referred to in reference (c), it is recommended that trial by general court-martial be initiated.

3. In accordance with current instructions from ComThirteenth Boscola will be retained at this command pending trial.

J. J. GREYTAK.

PLAINTIFF'S EXHIBIT NO. 2

(Admitted April 12, 1956.)

29 September 1954

My dear Mr. Smith:

I take great pleasure in forwarding the attached letter from the Chief of Naval Personnel and in congratulating you on your completion of more than thirty years' honorable service. Your retirement has been richly earned and is well deserved.

My best wishes for many years of good health and happiness.

Sincerely,

A. M. BLEDSOE,

Rear Admiral, USN, Commandant Thirteenth Naval District.

Encl.

Peter Jacobsen Smith, 371 59 27, TMTC, USN
(Ret), Box 29, Keyport, Washington.

Department of the Navy
Bureau of Naval Personnel
Washington 25, D. C.

in reply refer to

Pers-B221e-we

MM 371 59 27

18 August 1954

From: Chief of Naval Personnel

To: Commandant Thirteenth Naval District

Subj: Smith, Peter Jacobsen, 371 50 27, TMC
(f4D), USNFR

Ref: (a) ComThirteen ltr ser 22-463 of 14 Jun
1954

(b) CNP ltr Pers B221e-ew MM 371 59 27
Undtd to Com-13 (Mailed 25 March
1954)

1. The additional information forwarded by reference (a) in subject man's case together with the Commandant's recommendation in the premisis have been carefully reviewed.

2. In view of the serious nature of the offense of which subject man was convicted by the State of Washington authorities, it is considered that the maintenance of high standards for naval personnel, active or inactive, requires recourse to appropriate disciplinary measures in this case. Should Smith elect trial by general court-martial, however, the various favorable facts enumerated in reference (a) will of course be available to him as matters in extenuation or mitigation.

3. Compliance with the procedure outlined in reference (b) is accordingly requested.

/s/ J. C. DANIEL,
J. C. DANIEL,
Assistant Chief of Naval
Personnel.

Copy to:

JAG

ComNavBaseBrem

JAG:I:2:EJB:dvj

Smith, Peter J.

10 Feb 1954

From: The Secretary of the Navy

To: Chief of Naval Personnel

Subj: Smith, Peter Jacobsen, 371 59 27, CTM
(F4D) USNFR

Ref: (a) Ltr Chief of NavPers to SecNav
(JAG), Pers-B221e-BMC, MM 371 59
27, 19 Jan 1954

(b) Title 34, USC, §854d

(c) SecNavInst 5810.1 dtd 5 March 1954

1. Receipt of reference (a) requesting permission on behalf of Commandant, Thirteenth Naval District, to try subject-named man by general court-martial is acknowledged. In view of the serious nature of the offense it is considered that this case

comes within the excepted class of cases referred to in reference (c) and, accordingly, permission to try Smith by general court-martial is hereby granted.

2. While not essential, it is considered that recall to active duty as authorized by reference (b) is appropriate; however, the final decision as to this aspect of the case is left to the administrative discretion of the Bureau of Naval Personnel.

J. H. SMITH, JR.,
Assistant Secretary of the
Navy for Air.

Copy to:

Com13

[Title of District Court and Cause.]

No. 4101

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) FRCP, I am transmitting herewith the following original papers in the file dealing with the action, excluding exhibits, as the record on ap-

peal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Writ of Habeas Corpus, filed 3-7-56.
2. Petitioner's Memorandum of Points and Authorities, filed 3-7-56.
3. Order to Show Cause, filed 3-7-56.
4. Marshal's Return on Show Cause Order on USA, filed 3-13-56.
5. Notice of Appearance of Respondents, filed 3-22-56.
6. Letter, US Dept. Justice to Parsons, filed 3-22-56, re service.
7. Stipulation and Order for Consolidation with Cause No. 4105, filed 3-28-56.
8. Stipulation and Order that physical presence of Respondents in court will not be necessary, filed 3-28-56.
9. Return to Order to Show Cause, filed 4-2-56.
10. Affidavit of Service by Mail, filed 4-2-56.
11. Order Fixing Date for Filing Briefs and Final Argument, filed 4-2-56.
12. Respondents' Memorandum in Support of Motion to Quash Order to Show Cause and to Dismiss, filed 4-6-56.
13. Stipulation of Facts, filed 4-10-56.
14. Memorandum Opinion, filed 5-1-56.
15. Findings of Fact and Conclusions of Law, filed 5-8-56.
16. Order Sustaining Writ of Habeas Corpus and Ordering Release of Petitioner, filed 5-8-56.

17. Notice of Appeal, filed July 3, 1956.

18. Motion for Order Extending Time for Filing Record and docketing appeal, filed Aug. 9, 1956.

19. Court Reporter's Transcript of Portion of Proceedings had on April 13, 1956, filed Aug. 14, 1956.

20. Order for Transmittal of certain exhibits, filed Aug. 15, 1956. Petitioner's Exhibits 1, 3, 4 and 5.

21. Notice of Appeal.

Witness my hand and official seal at Seattle this 30th day of August, 1956.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

No. 4105

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivisin 1 of Rule 10 of the United

States Court of Appeals for the Ninth Circuit, and Rule 75(o) FRCP, I am transmitting herewith the following original papers in the file dealing with the action, excuding exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Writ of Habeas Corpus, filed 3-12-56.
2. Order to Show Cause, filed 3-12-56.
3. Marshal's Return on Order to Show Cause (Service on USA), filed 3-13-56.
4. Letter. Dept. Justice to Parsons, re service, filed 3-22-56.
5. Appearance of respondents, filed 3-26-56.
6. Brief and Memo. of Petitioner, filed 4-6-56.
7. Findings of Fact and Conclusions of Law, filed 5-8-56.
8. Judgment, filed May 8, 1956.
9. Notice of Appeal, filed 7-3-56.
10. Motion for Order Extending Time for Filing Record and docketing appeal. filed Aug. 9, 1956.
11. Relator's Exhibit 2.
12. Notice of Appeal.

Witness my hand and official seal at Seattle this 30th day of August, 1956.

[Seal]

MILLARD P. THOMAS.

Clerk.

By /s/ TRUMAN EGGER.

Chief Deputy.

[Endorsed]: No. 15226. United States Court of Appeals for the Ninth Circuit. Rear Admiral A. M. Bledsoe, U. S. Navy; Capt. J. J. Greytak, U. S. Navy, et al., Appellant, vs. United States, ex rel., Louis V. Boscola, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed and Docketed August 6, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 15225. United States Court of Appeals for the Ninth Circuit. Charles S. Thomas, Assistant Secretary of Defense for the Navy, et al., Appellant, vs. United States of America on the relation of Peter J. Smith, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed and Docketed August 6, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 15225

CHARLES S. THOMAS, et al.,

Appellants,

vs.

UNITED STATES ex rel., PETER J. SMITH,

Appellee.

No. 15226

REAR ADMIRAL A. M. BLEDSOE, et al.,

Appellants,

vs.

UNITED STATES ex rel., LOUIS V. BOSCOLA,

Appellee.

STATEMENT OF POINTS RELIED UPON
ON APPEAL

Come Now appellants in the above-entitled causes and furnish a list of points to be relied upon on appeal:

1. The District Judge erred in admitting over objection evidence concerning the reason for which petitioners were recalled to active duty .

2. The District Judge erred in finding that petitioners were recalled into the Navy for no duty.

3. The District Judge erred in finding that petitioners were not assigned to any duty.

4. The District Judge erred in finding that petitioners were recalled for the purpose of trial by court-martial, separation from the service, or accomplishment of a punitive discharge.

5. The District Judge erred in sustaining the Writ of Habeas Corpus and ordering petitioners released from active duty.

Dated this day of August, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States Attorney, Counsel for Appellants, Charles S. Thomas, et al., Rear Admiral A. M. Bledsoe, et al.

By /s/ TRACY E. GRIFFIN,
DAY AND WESTLAND,
Counsel for Appellee, Boscola.

Receipt of copy acknowledged.

[Endorsed]: Filed August 18, 1956.

[Title of Court of Appeals and Cause.]

Nos. 15225 and 15226

STIPULATION FOR ORDER OF
CONSOLIDATION

It Is Stipulated by and between Charles P. Moriarty, United States Attorney for the Western District of Washington, and Edward J. McCormick, Jr., Assistant United States Attorney, counsel for appellants Charles S. Thomas, et al., and Rear Admiral A. M. Bledsoe, et al., and Rummins, Griffin, Short and Cressman, counsel for appellee United States ex rel., Peter J. Smith, and Day and Westland, counsel for appellee United States ex rel., Louis V. Boscola, that the two causes above titled may be consolidated for all purposes in the Court of Appeals, including but not limited to the Transcript of Record, briefs on behalf of all parties, hearings, arguments, stipulations and continuances for the reason that the causes arise from nearly identical facts, that the matters were consolidated for hearing in the trial court, a single memorandum decision was rendered by the trial court, and the alleged errors of law committed by the trial court were identical.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States Attorney, Counsel for
Charles S. Thomas, et al., Counsel for Rear
Admiral A. M. Bledsoe, et al.

RUMMINS, GRIFFIN, SHORT
and CRESSMAN,

By /s/ TRACY E. GRIFFIN,

Counsel for Appellee, United States ex rel., Peter
J. Smith.

DAY AND WESTLAND,

By /s/ TRACY E. GRIFFIN,

Counsel for Appellee, United States ex rel., Louis
V. Boscola.

So Ordered this 20th day of August, 1956.

/s/ WILLIAM DENMAN,

/s/ HOMER T. BONE,

/s/ WILLIAM E. ORR,

United States Circuit Judges.

[Endorsed]: Filed August 21, 1956.

